No. 491

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

GALAX MIRROR COMPANY, INCORPORATED,
MOUNT AIRY MIRROR COMPANY AND
J. A. MESSER, SR.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

CITATIONS

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Galax Mirror Company, Incorporated, Mount Airy Mirror Company and J. A. Messer, Sr., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in this case on October 6, 1958.

OPINIONS BELOW

The District Court did not hand down an opinion. The opinion of the Court of Appeals, printed in Appendix B hereto, *infra*, pp. 5a-16a, is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 6, 1958 (Appendix B, *infra*, p. 16a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the denial of defendants' motion at the trial for production of the relevant grand jury testimony of the principal Government witness for purposes of cross-examination constituted error.

2. Whether the trial judge erred in removing from issue at the trial substantive allegations in the indictment which charged continuation of the alleged conspiracy, thereby amending the indictment.

STATUTES AND RULES INVOLVED

The statutes and rules involved are Section 1 of the Sherman Act, 26 Stat. 209, as amended, 50 Stat. 693, 69 Stat. 282, 15 U.S.C. 1; Act of July 7, 1955, 69 Stat. 282 (amending 15 U.S.C. 1); Act of September 2, 1957, 71 Stat. 595, 18 U.S.C. 3500; and Federal Rules of Criminal Procedure, rule 6(e), 18 U.S.C. They are printed in Appendix A, *infra*, pp. 1a-4a.

STATEMENT

On March 26, 1957, an indictment was returned (App. 692-699)[1] against seven corporate and three indi-

[1] Citation refers to printed Appendix to Appellants' Briefs in the court below.

vidual defendants charging a conspiracy to fix prices in violation of Section 1 of the Sherman Act, as amended, 26 Stat. 209, 15 U.S.C. 1 (Appendix A, *infra*, p. 1a). The jurisdiction of the District Court was invoked because the indictment charged an offense against the laws of the United States.

Named as defendants in the indictment were six mirror manufacturing companies located in Virginia and North Carolina; the Pittsburgh Plate Glass Company, a supplier of plate glass to mirror manufacturers and itself a mirror manufacturer in North Carolina; and three company executives named as individual defendants (App. 692-694). The Mirror Manufacturers Association, a trade association, and all mirror manufacturers in Virginia and North Carolina not listed as defendants were named as co-conspirators (App. 694). It was alleged in a single count that defendants and co-conspirators had, beginning in October, 1954, engaged in a continuing conspiracy to fix the prices of plain plate glass mirrors sold by them to furniture manufacturers (App. 697). The means and methods allegedly used in carrying out the conspiracy were the adoption and use of a uniform list price schedule and agreement upon a uniform discount from list price which was from "time to time" changed by agreement (App. 697-698).

The conspiracy charged in the indictment allegedly arose out of two meetings, held in late October of 1954, which were followed by a general rise in the price of plate glass mirrors (App. 433). The first meeting, a semi-annual convention of the Mirror Manufacturers Association, held in Asheville, North Carolina, on October 24-27, 1954, was attended by representatives of all the defendant companies (App. 116-119, 612-619). The

second meeting, held on October 28, 1954, at "The Bluffs," an inn on the Blue Ridge Parkway, was attended by defendant J. A. Messer, Sr., chairman of the boards of defendants Galax Mirror Company, Incorporated, and Mount Airy Mirror Company; A. G. Jonas, president of Lenoir Mirror Company, a mirror manufacturer not named as a defendant; and by representatives of two other defendant companies (App. 189-190, 225-226). Jonas became the principal Government witness at the trial.

The trial, before a jury, began on November 18, 1957, in the United States District Court for the Western District of Virginia, at Roanoke (App. 1). At the commencement of the trial, defendants raised in chambers (App. 4-13) certain problems resulting from the change in the statutory maximum penalty from $5,000 to $50,000, enacted on July 7, 1955, 69 Stat. 282, amending 15 U.S.C. 1 (Appendix A, *infra*, p. 1a). It was pointed out that the indictment charged in a single count a conspiracy entered into before and, apparently, continuing after the change in penalty (App. 5-6). In the event of a verdict of guilty, it would be impossible to determine whether the jury found the conspiracy to have continued beyond the date of the change in penalty, and the trial judge would not know which of the two penalty standards should be applied (App. 6-7). A motion to dismiss the indictment was made and immediately denied by the trial judge (App. 12).

Although he denied the motion, the trial judge thereafter limited the scope of the trial in an apparent effort to avoid the problems raised by the change in penalty. Early in the trial, the trial judge excluded evidence proffered by defendants relating to mirror prices in December, 1955 (App. 77-80). During a colloquy in

chambers which followed this ruling (App. 81-102), the trial judge indicated to counsel that he would exclude any evidence directed to the issue of whether defendants carried out or continued the alleged conspiracy (App. 86, 92). Moreover, he would confine evidence concerning whether a conspiracy was entered into to periods prior to July, 1955, when the change in penalty was enacted (App. 94-95). One effect of these restrictions on the scope of the trial was to exclude the major part of a comprehensive accounting study of the actual sales prices of the defendant companies from 1953 to the date of the indictment, demonstrating the existence of price competition throughout the entire period (App. 15-21, 346, 771-773, 776-778). At the conclusion of the trial, and in response to questions by jurors, the trial judge instructed the jury to disregard the issue of whether the alleged conspiracy was, as charged in the indictment, carried out and continued (App. 511-517).

The trial testimony of Government witness Jonas (App. 231-251) was extremely damaging to defendants generally and to defendants Messer, Galax and Mount Airy in particular. Jonas testified that the meeting at "The Bluffs," at which he was present, was called for the purpose of achieving a price-fixing agreement (App. 241, 243). He was the only witness to testify that a price-fixing agreement was entered into and he testified to his own participation in such an agreement (App. 245-249). Moreover, Jonas singled out defendant Messer as a ring-leader in the alleged conspiracy and stated that Messer had dictated the terms of the agreement (App. 245).

Under examination by defense counsel in the absence of the jury, Jonas stated that he had testified before the grand jury on three separate occasions and that his grand jury testimony covered the same subject

matter as his testimony on direct examination (App. 263). Defendants thereupon moved for production of such portions of Jonas' grand jury testimony as related to matters testified to by him on direct examination for use by defendants in cross-examination of Jonas (App. 259, 264). The trial judge ruled that, since defendants had not established any inconsistencies between Jonas' testimony at the trial and his grand jury testimony, their motion would be denied (App. 259, 264).

On December 3, 1957, the jury returned a verdict of guilty against all seven corporate and the two remaining individual defendants (App. 518).[2] The trial judge then assessed fines of less than $5,000, apparently under the pre-1955 penalty standard, against each of the defendants (App. 526-530). From this judgment, these petitioners and the Pittsburgh Plate Glass Company appealed.

The court below affirmed the judgment of the District Court. Relying upon three recent decisions in the Second Circuit, *United States* v. *Spangelet*, 258 F. 2d 338 (C.A. 2nd, 1958), *United States* v. *Angelet*, 255 F. 2d 383 (C.A. 2nd, 1958), and *United States* v. *Consolidated Laundries Corporation*, 159 F. Supp. 860 (S.D.N.Y., 1958), the court concluded that the District Court had correctly denied defendants' motion for production of Jonas' grand jury testimony. In addition, the court held that, since continuation of the alleged conspiracy was not an essential element of the crime charged, "[d]isregard of this 'continuing' feature was immaterial" (Appendix B, *infra*, p. 10a).

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[2] The trial judge had granted a motion for acquittal as to defendant W. A. Gordon of Pittsburgh Plate Glass Company at the close of the Government's case (App. 285-289).

REASONS FOR GRANTING THE WRIT

A. Production of Grand Jury Testimony.

1. The decision of the court below, denying defendants' motion for production of the grand jury testimony of Government witness Jonas, is directly in conflict with the decision of the Court of Appeals for the Third Circuit in *United States* v. *Rosenberg,* 245 F. 2d 870 (C.A. 3rd, 1957).

In the *Rosenberg* case, the court decided that the principles set forth by this Court in *Jencks* v. *United States,* 353 U.S. 657 (1957) applied not only to statements made to investigative agencies by prosecution witnesses but to their grand jury testimony as well. Accordingly, the Third Circuit rejected the practice of *in camera* inspection by the trial judge and held that the refusal to permit defense counsel to inspect the grand jury testimony of a prosecution witness constituted reversible error. The court stated (245 F. 2d at 871):

> "The failure of the trial judge to permit counsel for the defendant to inspect at the trial the witness' grand jury testimony and statement to the F.B.I., as required by the rule announced in the Jencks case, compels us to grant a new trial."

The court below, however, thought it clear (Appendix B, p. 13a) "that the production of grand jury testimony is not governed by *Jencks* nor by the subsequent legislation, now 18 U.SC.A. Sec. 3500 . . .," (Appendix A, *infra,* p. 1a). Thus, the court below, contrary to the *Rosenberg* decision, refused to permit inspection by defense counsel without prior *in camera* inspection by the trial judge. The court said (Appendix B, p. 14a):

> "The practice which has been adopted in respect to the grand jury testimony of a witness does not contemplate the delivery of the transcript to defense counsel without any inspection by the Judge."

Moreover, the decision of the court below does not require that defense counsel be permitted inspection even where the trial judge, in the course of his *in camera* inspection, finds inconsistencies between the witness' grand jury and trial testimony. The court said (Appendix B, p. 15a):

> "If the Judge finds inconsistency, and deems it in the interest of justice to bring it to the attention of the cross-examiner, he may do so. If merely inconsequential deviations are found, he is not required to provide the cross-examiner a basis for ranging over a wide area of collateral and minute detail."

Compare *United States* v. *H. J. K. Theatre Corporation*, 236 F. 2d 502, 507, (C.A. 2nd, 1956), *cert. den., sub nom. Rosenblum* v. *United States*, 352 U.S. 969 (1957); *United States* v. *Spangelet*, 258 F. 2d 338, 341 (C.A. 2nd, 1958).

2. The question presented is clearly one of importance in the administration of criminal justice in the federal courts. It is a question which arises frequently and which presents a possible conflict between the tradition of grand jury secrecy and the interests of justice in disclosure and cross-examination. In *United States* v. *Procter & Gamble Company*, 356 U.S. 677, 683 (1958), this Court said:

> "We do not reach in this case problems concerning the use of the grand jury transcript at the trial to impeach a witness, to refresh his recollection, to test his credibility and the like."

There is a compelling need for this Court now to consider these problems and to set forth standards for the exercise of the trial court's discretion under Rule 6(e) of the Federal Rules of Criminal Procedure, 18 U.S.C. (Appendix A, *infra*, p. 3a).

The need for uniform standards to guide trial courts in this critical area is shown by the varied practices that have arisen in the three judicial circuits that have considered the question since the *Jencks* decision. In the Third Circuit, defendants are allowed to inspect the grand jury testimony of prosecution witnesses without prior inspection by the trial judge. *United States* v. *Rosenberg, supra.*

In the Second Circuit, the proper procedure, when a "credibility test" is presented, is for the trial judge to inspect *in camera* the witness' grand jury testimony to seek possible inconsistencies with his trial testimony. *United States* v. *Spangelet*, 258 F. 2d 338, 339 (C.A. 2nd, 1958). In this task the trial judge is apparently to have the assistance of the prosecutor. *Ibid.* at 342. If inconsistencies are discovered, then, but not otherwise, the trial judge must disclose to the defendant those portions of the witness' grand jury testimony which conflict with his trial testimony. See *United States* v. *H. J. K. Theatre Corporation*, 236 F. 2d 502, 507 (C.A. 2nd, 1956), *cert. den., sub nom. Rosenblum* v. *United States*, 352 U.S. 969 (1957).

Finally, under the procedure adopted in the Fourth Circuit, as set forth in the opinion below, inspection by defense counsel is not permitted and it is entirely a matter of discretion as to whether the trial judge will make an *in camera* inspection. Noting that the practice of inspection by the trial judge "has serious drawbacks," the court concluded that a trial judge

may, when it appears "wise and just," inspect a witness' grand jury testimony "to check a particular point sharply in issue"; but a trial judge is not required "to attempt to ferret out inconsistencies in a lengthy transcript" (Appendix B, pp. 15a-16a).[3] If the trial judge should discover an inconsistency, then he may bring it to the defendant's attention if he "deems it in the interest of justice" (Appendix B, p. 15a).

In short, the need for this Court to establish uniform standards and procedures is clear.

Furthermore, there are important questions presented concerning the effect of the new statute, 71 Stat. 595, 18 U.S.C. 3500 (Appendix A, *infra*, p. 1a), enacted on September 2, 1957, upon the law regarding the production of grand jury minutes. Section 3500 does not refer to grand jury minutes, and there is agreement that they need not be made available under the statutory procedures. See the decision below, Appendix B, at p. 14a; *United States* v. *Spangelet*, 258 F. 2d 338, 340 (C.A. 2nd, 1958); *United States* v. *Angelet*, 255 F. 2d 383, 385 (C.A. 2nd, 1958); *United States* v. *Consolidated Laundries Corporation*, 159 F. Supp. 860, 867-868 (S.D.N.Y., 1958).[4] Presumably, then, the

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[3] In the *Spangelet* case, the trial judge inspected the grand jury testimony of a prosecution witness but failed to discover an inconsistency which was later found by the appellate court. 258 F. 2d at 341-342. Significantly, in *Jencks* v. *United States*, *supra*, it was said regarding FBI statements (353 U.S. at 668-669):

> "Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to determine what use may be made of them. Justice requires no less."

[4] *United States* v. *Rosenberg*, *supra*, was decided on June 26, 1957, prior to the enactment of Section 3500.

statute neither affects the law regarding production of grand jury testimony, nor determines the applicability of the *Jencks* decision to such testimony. In *Spangelet*, however, the Court of Appeals for the Second Circuit said that, since the enactment of Section 3500, possible application of the *Jencks* decision to grand jury testimony was "an academic problem" and that "[t]he legislative history of that section demonstrates that Congress does not intend that grand jury minutes should be made available under the *Jencks* procedure." 258 F. 2d at 340. The court determined that the "pre-Jencks rule" should be followed. *Ibid.* at 341. In *Consolidated Laundries, supra*, the District Court, finding that grand jury minutes were omitted by Congress from "the category of statements to be turned over to the defense without prior inspection by the trial judge," concluded that Congress "has validly legislated on the subject and left . . . in force" the pre-*Jencks* rule. 159 F. Supp. at 868.[5]

The court below, on the other hand, expressed the following view regarding the new statute (Appendix B, p. 15a):

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[5] While the Second Circuit view is that use of the pre-*Jencks* rule is required by statute, that rule is nonetheless said to have been modified by the *Jencks* decision to the extent that "a defendant's access to the grand jury minutes does not depend on a showing that the witness's testimony was inconsistent with that he gave before the grand jury." *United States* v. *Spangelet*, 258 F. 2d 338, 341 (C.A. 2nd, 1958). Similarly, although the court below thought that the practice regarding production of grand jury minutes was "unaffected by recent decisions" (Appendix B, p. 15a), it agreed with *Spangelet* that a trial judge may make inspection "without necessarily requiring a prior showing of inconsistency" (Appendix B, p. 15a).

"Section 3500 does not profess to make, and cannot properly be read to require, any alteration in the practice concerning grand jury minutes."

This Court should determine whether or not Congress has, in enacting Section 3500, legislated by implication regarding production of grand jury minutes.

3. The decision of the court below is erroneous and the conflicting decision of the Court of Appeals for the Third Circuit in *United States* v. *Rosenberg, supra,* correct. Defendants' motion called for production of only relevant portions of the testimony of a single grand jury witness. This witness had become the principal prosecution witness at trial, and production was sought for the purpose of cross-examining him. In such a situation, as this Court has noted, there is a "particularized need" and grand jury secrecy is sought to be "lifted discretely and limitedly." *United States* v. *Procter & Gamble Company,* 356 U.S. 677, 683 (1958).

Of the traditional rationales for grand jury secrecy, see *United States* v. *Rose,* 215 F. 2d 617, 628-629 (C.A. 3rd, 1954), only one—that witnesses might not testify freely before the grand jury if their testimony was later to be disclosed—has any relevance here, where disclosure is sought after the witness has testified at the trial. See 8 Wigmore, *Evidence* §2362 (3rd Ed., 1940). Moreover, defendants' motion for production extended only to matters concerning which the witness had already testified on direct examination. The disclosure sought related only to events or topics which the prosecution had itself raised and brought into the trial. A truthful grand jury witness would have no reason to fear disclosure at trial of that part of his grand jury testimony which related to matters already covered on

direct examination. If grand jury witnesses were assured of the secrecy of their testimony, the result might be "to invite possible perjury." *United States* v. *Ben Grunstein & Sons Company,* 137 F. Supp. 197, 201 (D.N.J., 1955).

Furthermore, the court below failed to give proper weight to the interests of justice in disclosure and cross-examination of witnesses. Cf. *Jencks* v. *United States, supra.* These interests clearly require the very limited invasion of grand jury secrecy sought in the instant case.

B. Amendment of Indictment.

1. The decision of the court below, that a trial judge may properly remove from issue portions of an indictment which do not set forth essential elements of the crime charged, is in conflict with the decision of this Court in *Ex parte Bain,* 121 U.S. 1 (1887) and with the decision of the Court of Appeals for the Ninth Circuit in *Edgerton* v. *United States,* 143 F. 2d 697 (C.A. 9th, 1944).

The right of criminal defendants to be tried upon the indictment returned by the grand jury without amendment by the trial judge or prosecutor was secured by this Court in *Ex parte Bain, supra.* The Fifth Amendment right to indictment by grand jury was said to require that (121 U.S. at 9-10):

> "The party can only be tried upon the indictment as found by such grand jury, and especially upon all its language found in the charging part of that instrument."

See *Carney* v. *United States,* 163 F. 2d 784 (C.A. 9th, 1947), *cert. den.,* 332 U.S. 824 (1947); *Dodge* v. *United States,* 258 Fed. 300 (C.A. 2nd, 1919), *cert. den.,* 250

U.S. 660 (1919). The doctrine of the *Bain* case has become a part of the Federal Rules of Criminal Procedure. See Notes of Advisory Committee on Rules, as to rule 7(d), Fed. Rules Cr. Proc., 18 U.S.C.A., after rule 7; compare rule 7(d) with rule 7(e). It is likewise settled that the prohibition against amendments is not limited to pen and ink changes in the indictment but extends to any practice which achieves the result of withdrawing allegations from, adding to, or otherwise altering an indictment. See *United States* v. *Norris*, 281 U.S. 619 (1930); *Edgerton* v. *United States, supra; United States* v. *Krepper*, 159 F. 2d 958, 969-970 (C.A. 3rd, 1946), *cert. den.* 330 U.S. 824 (1947).

In the instant case, the trial judge, in order to obviate the legal difficulties raised by the change in penalty during the course of the alleged conspiracy, 69 Stat. 282, amending 15 U.S.C. 1 (Appendix A, *infra*, p. 1a), withdrew from issue those allegations in the indictment charging continuation of the alleged conspiracy. This withdrawal was effected by excluding all evidence directed to the allegations of continuation (App. 92-95) and by instructing the jury to disregard the issue of whether the alleged conspiracy was carried out or continued (App. 511-517). The court below held that the withdrawal of these allegations did not constitute error because continuation was not an essential element of the crime charged. The court said (Appendix B, p. 10a):

> "Since the agreement itself constituted the offense, the additional allegation in the indictment that the conspiracy was 'continuing' did not set forth an essential element of the crime. Disregard of this 'continuing' feature was immaterial."

It is clear from the *Bain* and *Edgerton* cases, however, that the rule against amendment of an indictment is not limited to "essential elements" of the crime and that amendment "in any manner of substance" (*United States* v. *Fawcett*, 115 F. 2d 764, 766 (C.A. 3rd, 1940)) constitutes reversible error. If the rule against amending indictments is to be limited to "essential elements" of the crime charged, there would be no reason for its existence since, upon removal or disregard of an "essential element," the prosecution would fail simply because of the absence of allegation or proof as to that element.

Thus, in the *Bain* case, the indictment charged defendant with making a false report with intent to defraud the Comptroller of the Currency, the United States, and numerous banking associations and persons. 121 U.S. at 4. The trial judge struck the allegation regarding the Comptroller of the Currency and supported his action on the ground that "the words stricken out were surplusage, and were not at all material to it, and that no injury was done to the prisoner by allowing such change to be made." 121 U.S. at 9. Although the allegation stricken was plainly not essential to the crime charged, this Court set aside defendant's conviction because of the amendment to the indictment. In addition, in referring with approval to an earlier case in which the trial judge had refused to amend the indictment, the Court said (121 U.S. at 9):

> "It will be perceived that the amendment in that case had reference to a matter which the law did not require to be proved, as it was alleged, and which to that extent was not material."

Similarly, in *Edgerton* v. *United States*, *supra*, defendants were charged with using the mails to defraud.

The indictment alleged two misrepresentations: that all loans made pursuant to the alleged scheme were secured; and that such loans were made only upon the security of property approved by state officials. Upon submission of the case to the jury, the trial judge instructed the jury to disregard the latter allegation. On appeal, the Court of Appeals for the Ninth Circuit held that this instruction constituted reversible error. The court noted that the crime of using the mails to defraud could be completed "without any fraudulent representation being made or anyone actually defrauded." 143 F. 2d at 699. Thus, the allegation which was disregarded was concededly not essential to the crime charged. It was held, however, that, even though this allegation was not essential, the effect of the instruction was to amend the indictment and "to try the defendants on a charge not found by the grand jury. . . ." *Ibid.*

It is evident, then, that the decision of the court below is in conflict with the decisions in *Bain* and *Edgerton*.

2. The decision of the court below is erroneous. The rule against amending indictments has a constitutional foundation. As one court noted, the Fifth Amendment right to grand jury indictment "would be of little avail" if an indictment can be altered by the prosecuting officer or the court "to conform to their views of the necessity of the case." *United States* v. *Krepper*, 159 F. 2d 958, 970 (C.A. 3rd, 1947), *cert. den.*, 330 U.S. 824 (1947). If the indictment is altered, it cannot be said that the grand jury would have returned the indictment in its amended form. See *Ex parte Bain*, 121 U.S. 1, 9-10 (1887); *United States* v. *Dembowski*, 252 Fed. 894, 899 (E.D. Mich., 1918). The decision below, that a trial judge can withdraw or alter any allegation in an indictment which does not set forth an "essential

element" of the crime charged, could lead to serious abuse.

Even in cases where the alteration in the indictment has been purely formal, such as correction of a misnomer, appellate courts have closely scrutinized the actual conduct of the trial to determine whether the alteration had any effect upon its course and "whether any evidence the defendant might have would be equally applicable to the indictment in the one form as in the other. . . ." *United States* v. *Fawcett,* 115 F. 2d 764, 767 (C.A. 3rd, 1940). See also *United States* v. *Denny,* 165 F. 2d 668, 670 (C.A. 7th, 1947), *cert. den.,* 333 U.S. 844 (1948). In the instant case, the allegations withdrawn were substantive in nature, and the result of their withdrawal was to exclude a considerable body of evidence designed to rebut the charge of continuation. The evidence excluded was highly favorable to defendants, and they were entitled to benefit from it in the eyes of the jury. The trial judge, by withdrawing allegations from the indictment, modified the charge in the indictment and encroached upon the function of the grand jury. Such practices are prohibited by the Fifth Amendment and the *Bain* case.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

The Act of July 2, 1890, 26 Stat. 209, as amended, 50 Stat. 693, 69 Stat. 282, known as the Sherman Act, provides in part as follows:

> Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy declared by Sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. [15 U.S.C. 1]

The Act of July 7, 1955, 69 Stat. 282, provides as follows:

> Sections 1, 2, and 3 of the Act of July 2, 1890 (15 U.S.C. 1 ff.), as amended, are hereby further amended by striking out in each section where it appears, the phrase "fine not exceeding $5,000" and substituting in lieu thereof in each case the phrase "fine not exceeding fifty thousand dollars".

The Act of September 2, 1957, 71 Stat. 595, 18 U.S.C. 3500, provides as follows:

> Sec. 3500. *Demands for production of statements and reports of witnesses*
>
> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until

said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court *in camera*. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such

statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

Rule 6(e) of the Federal Rules of Criminal Procedure, 18 U.S.C., provides as follows:

Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment be-

cause of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7585.

PITTSBURGH PLATE GLASS COMPANY, J. A. MESSER, SR., GALAX MIRROR CO., INCORPORATED, and MT. AIRY MIRROR COMPANY, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT ROANOKE.

(Argued June 2, 1958. Decided October 6, 1958.)

Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

SOBELOFF, Chief Judge:

The indictment in this case charged a combination and conspiracy in unreasonable restraint of trade to fix prices for the sale of plain plate glass mirrors to furniture manufacturers in violation of Section 1 of the Sherman Act, 26 Stat. 209 (1890), as amended. All seven corporate and two of the three individual defendants were convicted. Appellants here are three of the convicted corporations, namely, Pittsburgh Plate Glass Company ("PPG"), Galax Mirror Company, Mount Airy Mirror Company; and one

of the individuals convicted, J. A. Messer, Sr., chairman of the board of the latter two companies.

Sufficiency of the Evidence

The first question on this appeal is that raised by PPG. It contends that the evidence was insufficient to sustain the jury's verdict that PPG was a party to the conspiracy.

The proceedings in the District Court reveal the following salient facts. The corporate defendants manufacture plain plate glass mirrors in Virginia and North Carolina and sell interstate to furniture manufacturers. PPG is primarily a seller of plate glass to manufacturers, who produce mirrors by applying silver and protective coatings to one side of the glass. PPG also maintains a warehouse in High Point, North Carolina, where it manufactures and sells mirrors. List prices are uniform in the industry upon the mirrors, which are standardized as to size and shape. The actual selling price, however, is at a discount from the list price. Discounts usually range from 78% and above. Thus, the lower the discount, the higher the price.

In October, 1954, the annual meeting of the Mirror Manufacturers Association was held at Asheville, North Carolina. Even though PPG was not a member of the Association, its sales manager of plate glass, W. A. Gordon, and several of his assistants, were present in Asheville at that time. Also in Asheville were the appellant Messer and representatives of three of the corporate defendants which were convicted but did not appeal: Robert Stroupe, Kenneth Hearn and Ralph C. Buchan. Also present in Asheville was A. G. Jonas, president of Lenoir Mirror Company, which was not a member of the Association. Neither the Lenoir Company nor Jonas was indicted, and Jonas was the principal prosecuting witness.

Prior to the 1954 convention, there had been a severe price war, the impact of which upon the industry was

accentuated by a decline in business. By the fall of that year, however, an up-swing in price was imminent due to a shortage of plate glass coincident with an increasing demand for mirrors by furniture manufacturers.

At Asheville, Messer, meeting with Hearn, Stroupe and Buchan, indicated an intention to raise his prices on mirrors to 78% off list. They telephoned Jonas, informing him that Messer wanted to raise his prices, and that everyone there was in agreement. Jonas expressed disbelief since Messer was well-known in the mirror industry as a price-cutter. Jonas requested that someone relay a message to PPG's Gordon to call him. Jonas testified that his purpose was to learn "if there was any truth in this matter." Gordon replied that "[i]n some of the rooms" he had "heard the fellows saying that they would like to get their prices increased," and although he wasn't trying to tell Jonas what he should do or not do, he thought that Jonas "ought to be getting more for the product than we were getting for" it.

The next day, Jonas, Buchan, Messer and Grady V. Stroupe (president of Stroupe Mirror Company) met at an inn called "The Bluffs" and agreed finally, in Jonas' words, "that 78 per cent was a fair price and we would go along on that basis." In his testimony Jonas stated several times that it was his impression that the increase in price hinged on his assent, and if he "didn't come along, prices wouldn't be raised." Everyone agreed to send out letters around October 29 announcing the increase. Jonas said that he would report the outcome of the meeting to PPG. Accordingly, he reached Sam Prichard, Gordon's assistant, by phone on October 29, and Jonas' testimony was that he told Prichard of the agreement reached at The Bluffs and requested him to notify his superior in PPG, Gordon. Jonas further asserted that in a phone conversation with Prichard on November 1, the latter reported that the message had been conveyed to Gordon. Prichard denied emphatically

any such calls from Jonas. The telephone bills of Lenoir Mirror Company, Jonas' employer, showed calls to PPG on the two dates on which Jonas claimed to have talked to Prichard. The telephone bill also showed additional calls to PPG during November.

On November 1, 1954, PPG sent a form letter to its customers announcing a price increase by reducing the discount to 78%. The other manufacturers had sent similar letters on October 29 announcing the identical increase, except Stroupe Mirror Company, whose letter went out on October 30.

The jury having found PPG guilty of participation in the conspiracy, the applicable rule in judging the sufficiency of the record to sustain the conviction is to consider it in the light most favorable to the prosecution. We may reverse only if we find that there was no substantial evidence, on the record as a whole, to support the verdict. *Carneal* v. *United States*, 212 F. 2d 20 (4 cir., 1954); *Garland* v. *United States*, 182 F. 2d 801, 802 (4 cir., 1950); *Jelazu* v. *United States*, 179 F. 2d 202, 205 (4 cir., 1950). Since conscious parallel business behavior *per se* does not establish a violation of the Sherman Act, *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954), *affirming* 201 F. 2d 306 (4 cir., 1953), proof that PPG announced a price rise identical with that announced almost simultaneously by its competitors was not enough by itself to convict. However, PPG "conscious parallelism," in light of its apparent close connection with the climax of the conspiracy, reasonably permitted the jury to infer that PPG sent the letters pursuant to an agreement with some or all of the conspirators. The proposition is too elementary to require elaboration, that participation in a criminal conspiracy need not be proved by direct evidence; "a common purpose and plan may be inferred from a 'development and a collocation of circumstances.'" *Glasser* v. *United States*, 315 U. S. 60, 80 (1942). In light

of the facts enumerated, we cannot say that the conviction was without substantial basis.

Alleged Variance

The defendants are aggrieved by an alleged variance between the indictment and the proof, which they assert is fatal to the Government's case. The indictment, brought in March, 1957, charged that

> "11. Beginning in or about October, 1954, or prior thereto, the exact date being to the grand jurors unknown, and *continuing* thereafter, the defendants . . . have been engaged in a combination and conspiracy in unreasonable restraint of trade. . . .
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> "12. The aforesaid combination and conspiracy has consisted of a *continuing* agreement, understanding and concert of action among the defendants . . . to stabilize and fix prices . . . by agreeing upon and *applying* in pricing plain plate glass mirrors a uniform discount, the amount of which, from time to time, has been changed by agreement. . . .
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> "13. *During the period of time covered by the indictment and for the purpose of effectuating and carrying out* the aforesaid combination and conspiracy, the defendants by agreement, understanding, and concert of action *have done things* which are hereinabove charged. . . ." (Emphasis supplied.)

The jury was instructed that a "continuing" conspiracy need not be proved; that the gist of the offense was a common understanding to fix prices; and that the Government need not prove that the agreement was effectuated, but only that the defendants entered into an agreement in violation of law.

The defendants contend that the charge in the indictment can be satisfied only by proof of a continuing agreement;

and further that the trial judge's instructions to the jury limiting the required proof to a showing that a conspiracy was entered into, regardless of its duration, constituted an amendment of the indictment. However, the indictment charges the single crime of conspiracy. The act of conspiring to violate the Sherman Act is an offense, and it is immaterial whether or not the purpose of the conspiracy was ever effectuated. *Nash* v. *United States,* 229 U.S. 373, 378 (1913), and *United States* v. *Trenton Potteries,* 273 U.S. 392, 402 (1927). Likewise, it need not be proved that the conspiracy continued for the duration charged in the indictment. *Cooper* v. *United States,* 91 F. 2d 195, 198 (5 cir., 1937). Evidence that the conspiracy continued would be pertinent in this case only to indicate somewhat that the conspiracy was actually entered into and to help determine the severity of the penalty. Since the agreement itself constituted the offense, the additional allegation in the indictment that the conspiracy was "continuing" did not set forth an essential element of the crime. Disregard of this "continuing" feature was immaterial.

Rulings on Scope of Evidence

The defendants, however, claim prejudice from rulings restricting the testimony to a narrower range than the allegedly broad charge in the indictment. They say that their efforts in preparing for trial were concentrated on defending against a charge of a conspiracy continuing up to the date of the indictment, March, 1957, and that when the trial judge ruled that the requirements of the indictment could be satisfied by proving the acts of October, 1954, and limited the evidence, they were in effect called upon to meet a "totally different case" than they had prepared to defend.

But the defendants in no way were misled, because they knew beyond question that the events of October, 1954, would be involved at the trial. They were not diverted

from this essential issue, for they were prepared to meet the Government's case as to this. In no practical sense were they prejudiced.

The defendants prepared a comprehensive study of price fluctuations in the industry from 1954 up to March, 1957, the date of the indictment, to show the lack of uniformity in prices, thereby suggesting that the conspiracy was not carried out. The trial judge, however, ruled that he would limit the testimony on both sides to July 7, 1955, the effective date of a statute increasing the maximum penalty for violations of the Sherman Act from $5,000.00 to $50,000.00. 69 Stat. 282 (1955). By this ruling, the court restricted the introduction of the price fluctuation reports to July, 1955. This limitation was for the protection of the defendant, to avoid the possibility of a verdict based upon acts partly before and partly after the change in the penalty provision.

Evidence for the period after July, 1955, was too remote to have significant bearing on the issue of the defendants' participation in the conspiracy in the fall of 1954. Indeed, the defendants did not even avail themselves of the full scope of the judge's ruling, which would have allowed such evidence for the period up to July, 1955. They elected to present a price fluctuation chart only for the month of November, 1954, the month immediately following the Asheville meeting and the announcements of price increases.

The Court's rulings on the scope of the permissible testimony were not erroneous, and the defendants could not conceivably have been prejudiced by them.

Instructions to Jury

The trial Court's refusal of a requested instruction that Jonas' testimony should be received with caution in view of the fact that he was an accomplice or conspirator was not error. It has been repeatedly held that while such an admonition is generally desirable, its omission is not neces-

sarily reversible error, *Caminetti* v. *United States*, 242 U.S. 470, 495 (1917), *Gormley* v. *United States*, 167 F. 2d 454, 457 (4 cir., 1948), *Hanks* v. *United States*, 97 F. 2d 309, 311, 312 (4 cir., 1938), for corroboration of an accomplice's testimony is not a requisite to conviction. *Caminetti* v. *United States, supra, Gormely* v. *United States, supra.* Moreover, Jonas' testimony was in many respects corroborated by other witnesses.

The contention that the instructions placed the burden of proof on the defendants and intimated to the jury that the Court believed Jonas is repudiated by the record. The Judge charged the jury that they were "the sole judges of the credibility of the witness and the weight you want to give to their testimony"; that he was "not vouching for [Jonas'] testimony," nor was he a "partisan of Mr. Jonas," and that it was for the Government to "prove . . . guilt beyond a reasonable doubt."

Grand Jury Testimony

After Government witness Jonas had said on cross-examination that his grand jury testimony related "to the same general subject matter" as his testimony in court, the defendants moved for the production of the transcript of his grand jury testimony. In the absence of a preliminary showing of inconsistency between the two versions, the trial judge denied the motion. The defendants at no time requested the Judge to make a preliminary inspection of the transcript to ascertain whether there was inconsistency. On the contrary, they insist that they, and not the trial judge, are to determine the existence *vel non* of inconsistency. The defendants rely on *United States* v. *Rosenberg*, 245 F. 2d 870 (3 cir., 1957), wherein the Court, feeling bound to apply the rule of *Jencks* v. *United States*, 353 U.S. 657 (1957), to grand jury testimony, held that the transcript should have been delivered directly to the defendant without prior examination by the Judge.

But whatever uncertainty may have existed shortly after the decision in *Jencks*, it is now clear that the production of grand jury testimony is not governed by *Jencks* nor by the subsequent legislation, now 18 U.S.C.A. Sec. 3500,[1] but

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[1] "Sec. 3500. *Demands for production of statements and reports of witnesses.*

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

"(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court *in camera*. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

"(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court

by the Federal Rule of Criminal Procedure 6(e), which vests discretion in the trial court. *United States* v. *Angelet*, decided May 19, 1958, —— F.2d —— (2 cir.); *United States* v. *Consolidated Laundries Corporation*, 159 F. Supp. 860, 862, 868 (S.D.N.Y., 1958); *United States* v. *Spangelet*, decided August 1, 1958, —— F.2d —— (2 cir.) The Jencks case dealt with the production of FBI reports. The legislative history of the recent statute negatives the notion that Congress meant to assimilate the practice with respect to grand jury testimony to that made applicable to a witness' statement to the Government. The congressional committee expressly rejected "any interpretation of the Jencks decision which would provide for production of . . . grand jury testimony . . . ," and cited the Rosenberg case as a "misinterpretation" of the Jencks decision. Senate Report No. 981, 85th Cong., 1st Sess. The practice which has been adopted in respect to the grand jury testimony of a witness does not contemplate the delivery of the transcript to defense counsel without any prior inspection by the Judge. *United States* v. *Spangelet, supra; United States* v. *H. J. K. Theatre Corporation*, 236 F.2d 502, 507, 508 (2 cir., 1956). The defendants' claim, as broadly presented, is insupportable and was properly

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may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

"(e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Pub. L. 85-269, Sept. 2, 1957, 71 Stat. 595."

overruled. The Court did not exceed the proper limits of the sound discretion vested in it by Rule 6(e).

For good reasons, rooted in long experience, courts have shielded grand jury proceedings from unnecessary exposure.[2] This tradition of the law is not to be abandoned without clear legislative direction. Section 3500 does not profess to make, and cannot properly be read to require, any alteration in the practice concerning grand jury minutes. Rule 6(e) stands unaffected by recent decisions and legislation. This is not to suggest, however, that in a case of "particularized need" the secrecy of grand jury testimony may not be "lifted discretely and limitedly." *United States* v. *The Proctor & Gamble Company,* decided June 2, 1958, 356 U.S. 672. When the circumstances seem to the Judge appropriate, he may make such inspection without necessarily requiring a prior showing of inconsistency. *United States* v. *Spanglet, supra.* If the Judge finds inconsistency, and deems it in the interest of justice to bring it to the attention of the cross-examiner, he may do so. If merely inconsequential deviations are found, he is not required to provide the cross-examiner a basis for ranging over a wide area of collateral and minute detail.

Even inspection by the trial judge, it must be recognized, has serious drawbacks. It would cast a heavy burden on the trial judge and seriously interrupt the trial for the Judge to attempt to ferret out inconsistencies in a lengthy transcript; he may not be able readily to absorb and evaluate every nuance in an extensive transcript. A further objection is that imposing this task on the Judge as regular procedure would draw him too deeply into the partisan task of preparing the cross-examination. From time to time instances may arise in which it will appear to the Judge wise and just to read the transcript to check a particular point

[2] The traditional reasons for the secrecy of grand jury proceedings have been frequently stated. They are succinctly set forth in *United States* v. *Rose,* 215 F. 2d 617 (3 Cir., 1954).

sharply in issue, but the minute examination, during the trial, of elaborate grand jury minutes should not be expected of him.

After all, what we are dealing with is a problem of the fair scope of cross-examination, and the sound judicial discretion of the trial judge must be the chief guide. When the subject matter is one as delicate as grand jury testimony, no fixed rule can be formulated. The Judge should not be compelled to inspect in all cases; neither should he indiscriminately refuse, but he should exercise his judgment according to the circumstances. Certainly we could not approve any rule, such as contended for by the defendants here, requiring the automatic delivery of grand jury transcripts to defendants on demand.

The judgment is

Affirmed.

Judgment

Filed and Entered October 6, 1958.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7585.

PITTSBURGH PLATE GLASS COMPANY, J. A. MESSER, SR., GALAX MIRROR CO., INCORPORATED, and MT. AIRY MIRROR COMPANY, *Appellants,*

v.

UNITED STATES OF AMERICA, *Appellee.*

APPEALS FROM the United States District Court for the Western District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Virginia, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

October 6, 1958.

Simon E. Sobeloff
Chief Judge, Fourth Circuit